



**Upper Tribunal
(Immigration and Asylum Chamber)**
IA/50175/2013

Appeal Number:

THE IMMIGRATION ACTS

Heard at: Field House

**Determination
Promulgated**

On: 17 July 2014

On 1 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JASPREET KAUR

(anonymity direction not made)

Respondent

Representation

For the Appellant: Ms K Pal, Home Office Presenting Officer

For the Respondent: Mr V Makol, Maalik & Co

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Prior in which he allowed the appeal of Miss Kaur, a citizen of India, against the Secretary of State's decision to refuse to vary leave to remain

as a Tier 4 (General) Student Migrant. I shall refer to Ms Kaur as the Applicant, although she was the Appellant in the proceedings below.

2. The application under appeal was made on 15 August 2013 and was refused by reference to paragraph 322(1)(A) of the Immigration Rules (HC395) on 13 November 2013. The Applicant exercised her right of appeal to the First-tier Tribunal. This is the appeal which came before Judge Prior on 23 April 2014 and was allowed. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by Designated First-tier Tribunal Judge Garratt on 5 June 2014 in the following terms
 1. The Respondent applies in time to appeal against the determination of Judge of the First-tier Tribunal R B L Prior in which he allowed the appeal under the Immigration Rules against the decision of the Respondent to refuse leave to remain as a Tier 4 (General) Student Migrant under the points based system.
 2. The grounds argue that the judge's consideration of allegedly false information in the form of an erroneous date of birth held in bank records was flawed.
 3. It is arguable that the judge should have shown that he followed the guidance set out in AA (Nigeria) [2010] EWCA Civ 773 before concluding that the information held by the bank arose from an error as opposed to a falsity.
3. At the hearing before me the Applicant was represented by Mr Mokal and Ms Pal appeared to represent the Secretary of State.
4. On behalf the Secretary of State Ms Pal relied on the grounds of appeal to the Upper Tribunal. She said that it did not appear from reading the First-tier Tribunal determination that the Judge had properly had regard to the appropriate standard of proof. The correct standard, Ms Pal referred to Re B (Children) [2008] UKHL 35, is the balance of probabilities not a higher standard. At paragraph 15 of the determination the finding that the Secretary State "*fell very far short*" in establishing deception is an indication that a much higher standard of proof than the balance of probabilities was imposed. The Applicant had ample time to obtain a document from Axis Bank that would confirm that it was a correct document. The refusal letter made the point at issue clear. The Secretary of State discharged the burden of proof upon her. Finally the Judge was wrong to suggest that the acceptance of the bank statement for assessment of maintenance purposes was of any assistance to the Applicant. The Secretary of State did not consider maintenance as the application fell for mandatory refusal.

5. For the Applicant Mr Mokal said that he had represented the Applicant at the First-tier Tribunal hearing and the submissions now made by the Secretary of State only sought to repeat what had been said before the First-tier Judge. The Judge was referred to and paid attention to the relevant case law. He applies the correct burden of proof which is the balance of probabilities to the higher end. The Judge considered all of the evidence and the submissions made. Paragraph 16 shows that he took account of the fact that the Applicant had not submitted further evidence.
6. I reserved my decision. Both representatives agreed that if I found that the determination of the First-tier Tribunal contained a material error of law there being no further evidence to be called it would be appropriate to proceed to remake the decision.

Error of law

7. I have considered the papers before me and the oral submissions of both parties very carefully. The issue to be decided by the First-tier Tribunal was a very straightforward one. The Applicant had applied to vary leave to remain as a student. To succeed in her application she needed to show that she had access to sufficient funds to meet the requirements of the Immigration Rules. To demonstrate compliance with this requirement she submitted what purported to be a bank statement of an account held by her mother Balwinder Kaur together with a copy of her mother's passport. The Secretary of State checked the documents with the bank and found that the date of birth of the account holder as recorded by the bank differed from the date of birth of the Applicant's mother as shown on her passport. The Secretary of State concluded that the Applicant's mother was not the account holder and refused the application by reference to paragraph 322 (1A) of the Immigration Rules on the basis that false representations had been made. In her Notice of Appeal to the First-tier Tribunal the Applicant said simply that she did not supply any false document in relation to her application, that the burden of proof is upon the Secretary of State and that the Secretary of State has not provided any evidence to meet this burden. Before the hearing the Secretary of State submitted a Document Verification Report (DVR) detailing a conversation between a representative of the Secretary of State and the bank where a bank official confirmed that the date of birth of the account holder was different from that of the Applicant's mother.

8. The determination of Judge Prior shows that he was alive to the issue before him and that he took account of the Applicant's written statement and her oral evidence. It was suggested in submissions that it was plausible that the bank had made an administrative error in relation to the date of birth of the Applicant's mother. The Judge found the Applicant to be a credible witness who denied any suggestion of dishonesty or deception. In dealing with the discrepancy the Judge found there was

"a discrepancy in the bank's record for the year of the mother's birth ... a near coincidence of the day of birth and a complete match of the month of birth"

and that this

"fell very far short of establishing the Respondent's case for engagement of paragraph 322 (1A) of the rules".

The Judge adds

"Furthermore, and crucially in my judgement, that discrepancy was not sufficient for the Respondent to deny evidential weight to the mother's statement of account with Axis Bank for the purpose of determining whether the Appellant met the maintenance requirement of the rules"

9. In my judgement there are two manifest and material errors of law disclosed. In the first place and there is no basis for the finding that a discrepancy between dates of birth on 20 May 1963 and 16 May 1968 fell far short of establishing the Secretary of State's case for engagement of paragraph 322 (1A) of the rules. These are substantially different dates of birth and to conclude otherwise was in my judgement irrational. Secondly the Judge has materially misdirected himself in finding that the discrepancy was not sufficient for the secretary of State to deny evidential weight to the bank statement for the purpose of determining whether the Applicant met the maintenance requirements of the rules. This is quite simply wrong. The Secretary of State having concluded that the application fell for mandatory refusal did not go on to consider whether the Applicant met the maintenance requirements of the rules. The fact that the Judge found this to be crucial emphasises the materiality of his error. For these reasons I set aside the decision of the First-tier Tribunal.

Remaking the decision

10. In remaking the decision the starting point is the refusal letter. This clearly spells out the reason why the Secretary of State refused the application.

"The date of birth of the Balwinder Kaur who is the account holder has a different date of birth from your mother".

There is now no dispute in this respect it being accepted that the date of birth of the Applicant's mother as shown by her passport is different from the date of birth recorded by the bank. It is a substantial difference. Despite this not only do the grounds of appeal to the First-tier Tribunal not engage with this discrepancy but the statement of the Applicant dated 23 April 2014 and the skeleton argument submitted to the First-tier Tribunal do not engage with this discrepancy. The statement records

"I have seen the verification report and I'm not sure why the details are what have been stated. I again confirm that my mother has account with Axis Bank".

The skeleton argument refers to the allegation of deception and quotes substantially from caselaw but does not at any point refer to the discrepancy in date of birth. It appears only to have been raised on the Applicant's behalf in oral submissions that

"it was entirely plausible that the bank had made an administrative error in relation to the date of the mother".

11. In my judgement it is not a question of the wrong burden or standard of proof having been applied. A clear and correct statement is made by the Secretary of State in the refusal letter dated 13 November 2013. That statement is corroborated by the Document Verification Report but in any event it is not in dispute that the statement is correct in that the date of birth recorded by the bank for the holder of the relevant account is different from the date of birth of the Applicant's mother. In my judgement this is quite sufficient to cause the Secretary of State not to be satisfied that this was a statement of the account of the Applicant's mother. To the extent that it is necessary in the circumstances to recite the burden and standard I am entirely satisfied that the Secretary of State has satisfied the burden of proof that is upon her to show on the balance of probabilities that this statement of account is not that of the Applicant's mother.
12. The Applicant made no concerted attempt at rebuttal in the grounds of appeal to the First-tier Tribunal, the witness statement, skeleton argument or indeed in oral evidence. Instead the Applicant sought to suggest, wrongly in my judgement, that the Secretary of State had not come up to proof. If rebuttal were possible there is little doubt that it would have been simple. A letter from the bank pointing out their error may well have been sufficient and even a paragraph in the

Applicant's statement explaining how the discrepancy arose may along with the positive credibility finding have helped. Speculation in submissions to the First-tier Tribunal that the bank may have made an administrative error is insufficient.

13. In my judgement the Respondent was correct to refuse this application by reference to paragraph 322 (1A) of the Immigration Rules. The Applicant's appeal is dismissed.

Summary

14. The decision of the First-tier Tribunal involved the making of a material error of law. I set aside that decision.
15. I remake the decision by dismissing the Applicant's appeal against the decision of the Secretary of State to refuse her application to vary leave to remain.

Signed:

Date:

**J F W Phillips
Deputy Judge of the Upper Tribunal**